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No. _____

In The

Supreme Court of the United States

October Term, 1998

CITY OF ATLANTA, GEORGIA,

Petitioner,

v.

R. MAYER OF ATLANTA, INC.; TONY N. UPCHURCH d/b/a CHUCK'S TRUCK; REGINA JENKINS d/b/a JENKINS WRECKER SERVICE CO.; FRED BURT d/b/a QUALITY WRECKER SERVICE; and UPMAN'S WRECKER SERVICE,

Respondents.

On Petition For A Writ Of Certioriari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE MIAMI-DADE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA IN SUPPORT OF PETITIONER CITY OF ATLANTA, GEORGIA

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STATEMENT OF CONSENT

Written consent of all parties has been obtained to file this amicus brief, and such consent accompanies the filing of this brief.

INTEREST OF AMICUS CURIAE[1]

Miami-Dade County is a political subdivision of the State of Florida. Section 11, Article VIII, 1885, of the Florida Constitution vests Miami-Dade County with the power of the Florida Legislature in matters of local concern. On July 11, 1989, the Miami-Dade Board of County Commissioners enacted Article III, Section 30, of the Code of Miami-Dade County, Florida, relating to towing of motor vehicles. This comprehensive ordinance was designed to regulate the towing industry at large and to prohibit abusive practices committed by various towing companies. Pursuant to Section 30-477 of the Code of Miami-Dade County, Florida, the Towing of Motor Vehicles Ordinance (Ordinance) is enforced by the Miami-Dade Consumer Services Department, the police forces of the various municipalities in Miami-Dade County, and the Miami-Dade Police Department. The Miami-Dade Consumer Services Department licenses all towing companies that regularly perform towing services within the confines of Miami-Dade County, Florida.

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[1] This brief was authored solely by the Miami-Dade Consumer Advocate, and not authored at all by counsel for a party. The entire expense of printing and serving the brief is to be paid by Miami-Dade County, a political subdivision of the State of Florida.

Miami-Dade County, Florida, is within the jurisdiction of the Eleventh Circuit Court of Appeals. Consequently, if the Eleventh Circuit decision is upheld by this court, Miami-Dade County, and all other local governments in this circuit, will be precluded from protecting its citizens from the pitfalls endemic to the towing industry.

This amicus brief is being filed by Leonard Leigh Elias in his capacity as the Miami-Dade Consumer Advocate. The Consumer Advocate is empowered by Section 2-25.2(a) and (b) of the Code of Miami-Dade County, Florida, to represent and protect the public interest in proceedings or hearings of any nature before the courts. "Public interest" is defined in Section 2-25.3 of the Code of Miami-Dade County, Florida, as "an interest or right arising from the Constitution, decisions of courts, common law or other laws, rules and regulations of the United States, or of this State or County, inhering in the citizens of this County or in a broad class of such citizens."

Based upon the preemption provision in 49 U.S.C. §14501(c)(1), the Eleventh Circuit Court of Appeals (1) invalidated Sections 162-223(a)-(c) of the City of Atlanta's towing ordinance relating to licensure, (2) through obiter dicta, held that states and municipalities can set only maximum prices for non-consensual tows, and (3) prohibited regulating any other aspect of tow truck operations. Miami-Dade County did not receive notice of the district court or Eleventh Circuit proceedings, thereby eliminating any opportunity to participate in this case.

The specific interest of Miami-Dade County, as Amicus Curiae, is its power and authority to regulate

towing in Miami-Dade County, Florida. The overall intent of the Miami-Dade Ordinance, in this regard, is expressed in its preamble, which provides that such regulation is appropriate and necessary because:

> . . . numerous persons and firms in Dade County engage in the business of recovering, towing, removing and storing of motor vehicles; and
>
> . . . such towing services frequently must be provided without the prior consent of the vehicle owner, or under circumstances which prevent negotiating the charges, terms and conditions for the towing service, often resulting in disagreements and complaints between vehicle owners and providers of towing services; and
>
> . . . the vehicles and equipment used to tow vehicles across the thoroughfares of Dade County and the manner in which towing is conducted are of considerable significance to the health, safety and welfare of the owners of towed vehicles and of the residents and visitors in Dade County; and
>
> . . . this Board finds it to be in the best interest of the County, its citizens and its visitors to license and regulate the business of providing such services within Dade County, to assure that all who provide the services are fit and competent to do so and that such services are delivered in a safe and efficient manner.

The Ordinance addresses a variety of safety and welfare concerns, and implements certain requirements for the towing industry, including inter alia: that principals of the towing company are to undergo a criminal background check, because crime is a real concern in local

municipalities; that towing vehicles are to be inspected for equipment to make sure that tows are performed in a safe and efficient manner; that insurance is to be required and verified because of the inherent danger in transporting other vehicles and inevitable accidents resulting therefrom; that standards and procedures are to be established regulating the towing of cars from private property without the consent of the owner or driver of the vehicle because cars have been held hostage until the consumer paid exorbitant fees in cash; and that predatory practices of roadside solicitors are to be prohibited because stranded motorists are "sitting ducks" for unscrupulous towers.

SUMMARY OF THE ARGUMENT

Local governments have traditionally regulated the towing industry. By holding that municipalities are preempted from licensing towing companies, the Eleventh Circuit has effectively divested the ability of local governments to protect their citizens from abusive towing practices.

And, for the following reasons, if the Eleventh Circuit decision is upheld, no federal, state, or local authority will exist to regulate the towing industry. Historically, the federal government has not and – in all likelihood – will not be a source of regulatory authority. For their part, states have not regulated this industry because it is a local matter and, invariably, has been left exclusively to local governments. Therefore, local governments, the only remaining source of regulatory authority, who have

traditionally regulated the towing industry, are now precluded by the Eleventh Circuit decision from exercising that regulatory mandate. And, inevitably, such a regulatory void will create an atmosphere of anarchy in the towing industry, which cannot be condoned or tolerated by this Court. Consequently, the Supreme Court must exercise its discretionary power to grant the Petition for Writ of Certiorari.

As expressed more fully below: (1) Congress lacks the power to preempt local governments from licensing and regulating towing activities; (2) Congress did not clearly and manifestly intend to preempt local government from licensing and regulating towing activities; (3) the Interstate Commerce Act does not prevent states from delegating to local governments the enforcement of the towing industry; and (4) licensing requirements of a towing company do not relate to the motor carrier's "price, route or service."

Thus, this case presents important federal questions that have not been, but should be, settled by this court, and clearly raises fundamental questions of public interest that are of paramount national importance.

REASONS FOR GRANTING THE WRIT

A. Congress lacks the power to preempt local governments from licensing and regulating towing activities.

When Title VI of the Federal Aviation Administration Authorization Act of 1994 ("Title VI") was enacted, it was

unclear whether Congress intended to include intrastate vehicle towing within Title VI's scope. In fact, the genesis of Title VI had nothing to do with towing and the district court in *426 Bloomfield Avenue Corp. v. City of Newark*, 904 F. Supp. 364, 370 (D. N.J. 1995), referred to Title VI as "linguistic morass." The statute simply stated that a state or municipality "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. §14501(c)(1). The genesis of this law stems from the decision of the United States Court of Appeals in *Federal Express Corp. v. California Public Util. Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992), wherein the Ninth Circuit held that Federal Express was an air carrier for purposes of the Airline Deregulation Act of 1978 and, thus, was not subject to California's intrastate economic regulation. Consequently, Federal Express and other deregulated shippers had a competitive benefit over shippers that were not air carriers, but who were governed by state and local economic regulations. See *426 Bloomfield Avenue Corp. v. City of Newark*, 904 F. Supp. 364, 370 (D. N.J. 1995). The intended purpose of Title VI was to "create a less regulated, uniform, market-driven economy for those who buy and sell the transportation services of motor carriage" so as to "even the playing field between air carriers and motor carriers." *Rhode Island Public Towing Ass'n v. State of Rhode Island*, 1997 U.S. Dist. LEXIS 3316, at 21-22 (D. R.I. 1977). In short, Congress intended to preempt state and local regulation of economic aspects of the shipping and trucking industries in

an effort to achieve free market competition. Conf. Rep. on H.R. 2739, 140 Cong. Rec. H 7116.

In 1995, Congress amended Title VI in the Interstate Commerce Commission Termination Act of 1995, to include an exemption for state and local regulations. The exemption authorizes state and local governments to enact laws relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle. The Eleventh Circuit opined that this dangling exception permits local governments to regulate prices of nonconsensual tows, while leaving undisturbed the preemptive effect of the statute as it pertains to all other aspects of the towing industry.

Amicus Curiae respectfully submits that Congress had no power to usurp the role of local governments in regulating local towing activities. Traffic control and the use of highways is an area that is peculiarly of local concern. The federal government does not regulate towing practices. Thus, there is no conflicting federal regulation in this regard. In *Railway Exp. Agency v. People of State of N.Y.*, 336 U.S. 106, 111, 69 S.Ct. 463, 93 L.Ed. 533 (1949), the Court noted:

> Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce.

In fact, Miami-Dade County, Florida, is located about four hundred miles from the border with its closest neighbor,

Georgia, thus posing absolutely no threat to interstate commerce. Miami-Dade County regulates towing activities regularly conducted within its municipal confines. But, because the facts in the case *sub judice* involve a towing company that is based outside the City of Atlanta, Amicus Curiae respectfully submits that instead of undermining the City of Atlanta's towing program (and all other municipal towing programs in the Eleventh Circuit), the court should have limited its ruling to the facts in that case and found the licensing requirement unconstitutional as applied only to an out-of-town tower.

Recently, in *United States v. Lopez*, 514 U.S. 549 (1995), 115 S.Ct. 1624, 131 L.Ed. 2d 626 (1995), this Court ruled that Congress lacked power under the Commerce Clause to criminalize possession of firearms in school zones. The message signaled in that case is very clear – the federal government is not prepared to address local law enforcement duties. There must be a political accountability, and because the federal government does not, and in all likelihood will not, address local problems relating to the towing industry, there can be no federal accountability. Very simply and succinctly stated, local regulation of towing activities does not substantially affect interstate commerce. Therefore, applying the *Lopez* case to the facts in the case *sub judice*, the congressional action to preempt local governments from licensing and regulating towing companies is violative of the Tenth Amendment and is unconstitutional.

B. Congress did not expressly and manifestly intend to preempt local governments from licensing and regulating towing activities.

The Eleventh Circuit, in the instant case, found that Congress expressly preempted the intrastate towing industry from local regulation through Section 14501(c) of Title VI. It is axiomatic that express preemption will be found only when the language used by Congress demonstrates clear evidence of its intent. As stated previously, when Title VI was enacted, it was unclear whether Congress intended to include intrastate vehicle towing within the scope of Title VI.

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), the court stated, "the historic police powers of the States [are] not to be superseded by [a] . . . Federal Act unless that [is] the clear and manifest purpose of Congress." As stated previously, the intended purpose of Title VI was to "create a less regulated, uniform, market-driven economy for those who buy and sell the transportation services of motor carriage" so as to "even the playing field between air carriers and motor carriers." *Rhode Island Public Towing Ass'n v. State of Rhode Island*, 1997 U.S. Dist. LEXIS 3316, at 21-22. It is obvious that Congress did not clearly and manifestly state that local governments are preempted from regulating the towing industry. In fact, 49 U.S.C §13506(b) provides that:

> [e]xcept to the extent the Secretary or Board, as applicable finds it necessary to exercise jurisdiction to carry out the transportation policy of

> section 13101, neither the Secretary nor the Board has jurisdiction under this part over –
>
> (1) transportation provided entirely in a municipality . . . [or]
>
> (3) the emergency towing of an accidentally wrecked or disabled motor vehicle.

Clearly, the overwhelming majority of tows take place entirely within a municipality. In addition, Congress made it eminently clear that local governments could regulate emergency towing of accidentally-wrecked or disabled motor vehicles, unless the Secretary or Board found to the contrary. There is absolutely no evidence in the record below demonstrating that the Secretary or Board found it necessary to exercise jurisdiction to carry out the transportation policy of Section 13101. Rather, the Eleventh Circuit panel usurped the role of the Secretary or Board and made findings that are more properly reserved for the executive branch of government, not the judiciary.

Congress' specific reference to "emergency towing of an accidentally wrecked or disabled motor vehicle" in 49 U.S.C §13506(b)(3) clearly and manifestly establishes that local governments are not preempted from licensing and regulating the towing industry. If Congress intended totally to prohibit local governments from licensing and regulating the towing industry, with the exception of preventing price gouging for nonconsensual tows, then Congress should have expressly articulated the preemption with that language. In the absence of clear and manifest language to the contrary, local governments should be able to exercise their police powers to regulate local towing activities.

C. The Interstate Commerce Act does not prevent states from delegating enforcement powers to local governments relating to towing activities.

Local governments throughout the United States continue to license and regulate towers because 49 U.S.C. §11501(b)(2)(A), now codified at 49 U.S.C. §14501(c)(2)(A), provides that the preemption:

> [s]hall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of requirements relating to insurance requirements and self-insurance authorization.

The Eleventh Circuit, however, opined that this statutory section is not applicable to local governments in the Eleventh Circuit because its provisions omit reference to state's political subdivisions. This finding clearly conflicts with this court's ruling in *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed. 2d 532 (1991), wherein it was held that the failure to include "political subdivisions" when mentioning "states" in an exception to a general rule is insufficient to demonstrate a clear and manifest congressional intent to preempt states from delegating authority to political subdivisions.

States routinely delegate enforcement powers to political subdivisions because local governments are better able to protect public safety on streets and highways.

The preamble to the Miami-Dade Towing of Motor Vehicles Ordinance, stated more fully hereinabove, graphically highlights the significant health, safety, and welfare concerns of the county. Political subdivisions clearly stand in the shoes of the state when it comes to addressing public safety concerns.

Consequently, the Eleventh Circuit's interpretation that 49 U.S.C. §11501(h)(2)(A), now codified at 49 U.S.C. §14501(c)(2)(A), applies only to states and not political subdivisions, fails to recognize the reality of local government's role in regulating the towing industry, and thereby leads to an absurd result.

D. Licensing requirements of a towing company do not relate to the motor carrier's "price, route or service."

In the instant case, the Eleventh Circuit found that because the towing company did not have a license, its route was affected. Quite to the contrary, however, it is respectfully submitted that the "route" restriction applies only when local governments tell a tower where it can travel and do business. But, in fact, because local government cannot tell a tower what its price, route or service should be, therefore, licensure is not based on those factors.

If local governments are not able to license towers, criminal background checks will not be performed, the public will not be protected from potential thieves, and there will be no governmental entity to ensure that tow trucks, dangerous instrumentalities by their own very

nature, meet minimum safety and equipment requirements and are insured. If the Eleventh Circuit decision is not reversed, a tower with a criminal background and no licensure will be able to offer his towing services to a stranded motorist and, upon consent, tow and remove the motorist's vehicle with an uninsured jalopy pick-up truck that does not meet minimum weight requirements.

Clearly, licensing serves a vital purpose, and the Eleventh Circuit decision establishes a bad precedent. The breadth of the Eleventh Circuit's opinion is overreaching, and creates an immediate chilling effect on the obligation of local governments to protect their citizens.

CONCLUSION

For the foregoing reasons, the Amicus Curiae respectfully requests the Court to grant the City of Atlanta's Petition for Writ of Certiorari.

Respectfully submitted,

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